SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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E. DAVIS, CLERK

In the Supreme Court of the United States

No. 1086

CITY OF MIAMI BEACH,
A Municipal Corporation of the State of Florida,
Petitioners,

vs.

NATHAN MANILOW & SAMUEL J. KANNER,
as Trustees,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Florida, and the Third District Court of Appeal of Florida.

RAPHAEL STEINHARDT
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Attorney for Petitioner

Of Counsel:

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City Attorney, and
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Assistant City Attorney
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MIAMI REVIEW — 971-9[illegible] — 673-9[illegible]

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In the Supreme Court of the United States

No. _____

CITY OF MIAMI BEACH,
A Municipal Corporation of the State of Florida,
Petitioners,

vs.

NATHAN MANILOW & SAMUEL J. KANNER,
as Trustees,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Florida, and the Third District Court of Appeal of Florida.

The Petitioner, CITY OF MIAMI BEACH, is a Municipal corporation of the State of Florida, created by Special Act of the Legislature. It prays that this court issue its Writ of Certiorari to the Supreme Court of the State of Florida, or to the Third District Court of Appeal of the State of Florida, to review the Final Judgment or Decree of the latter Court entered on August 6, 1968, and to review the Order of the Florida Supreme Court entered on September 10, 1969, denying the Petition of the City of Miami Beach for a Writ of Certiorari to the Third District Court of Appeal of the State of Florida.

Petition for Rehearing was denied by the Florida Supreme Court on October 20, 1969.

The Final Decree of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, In and For Dade County, is reported officially; the decree is set forth in full in the Appendix hereto.

The Judgment or Decree of the Third District Court of Appeal of the State of Florida reversing the Decree of the Circuit Court is reported officially in 213 So2d 589.

The Order of the Florida Supreme Court denying the Petition of the City of Miami Beach for Writ of Certiorari is reported officially in 226 So2d 805 — (Fla. 1969)

STATEMENT OF GROUNDS FOR JURISDICTION

The Order of the Florida Supreme Court denying the Petition of the City of Miami Beach for Writ of Certiorari was made and entered on September 10, 1969. The Florida Supreme Court made and entered its Order Denying Petition for Rehearing on October 20, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), because the Petitioner, its citizens, residents and taxpayers, have been deprived of due process of law and denied the equal protection of the law under the Fourteenth Amendment to the United States Constitution by state action through the decisions and judgments of the Florida Supreme Court, and of the Third District Court of Appeal of the State of Florida, agencies of the State of Florida.

The decisions on which review is sought were rendered by the highest Courts of the State. All appellate remedies of the State Courts have been exhausted.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

Zoning Enabling Act for the City of Miami Beach, Chapter 9837, Special Acts, 1923, Laws of Florida.

Ordinance Number 289, of the City of Miami Beach, commonly known as the "Zoning Ordinance of Miami Beach, Florida".

STATEMENT OF THE CASE

Procedural History of the Case

Nathan Manilow and Samuel J. Kanner, as Trustee, hereinafter called the "Respondents", filed a suit in the Circuit Court of the Eleventh Judicial Circuit, in the State of Florida, in and for Dade County, against your Petitioner, the City of Miami Beach, to:

1. "Decree the Defendant City's zoning Ordinance No. 289, as applied to Plaintiffs' said property, void and unconstitutional;"

2. "That the Defendant City be enjoined and restrained from enforcing RA single family use zoning against Plaintiffs' said property;"

3. "That the Defendant City be required on short date specified in the final decree to rezone Plaintiffs' said property to a use consistent with the facts and circumstances of this case . . . "

Your Petitioner filed its Answer to the Complaint, denying all material allegations of the complaint and asserted that a rezoning of said property would "deprive the entire area of adequate light and air; and would overcrowd the land and would cause a dangerous concentration of population of such high density as to endanger the health of the community. That a rezoning of said property would destroy the entire residential character of the neighborhood and would create conditions which, by an erosive process, would destroy the single family estate zoning from 41st Street to 63rd Street. That a rezoning of said property would create a species of spot zoning in its worst form."

At the final hearing, the Circuit Court heard the evidence adduced by the respective parties and thereafter entered its Order (Appendix, Page 34) upholding the Constitutional validity of the ordinance involved, and denying all the relief prayed for by the Respondents.

Respondents thereupon appealed to the Third District Court of Appeal of the State of Florida. Thereafter said Court entered its Opinion and Judgment reversing the Decree of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida in and for Dade County (Appendix, Page 25), holding:

> "That Plaintiff carried the burden of showing that this property was unsuitable for use under a single family residence classification and that it would be arbitrary and unreasonable to impose on this property a zoning classification more restrictive than RE multiple family zoning . . . "

The Petitioner, City of Miami Beach, Florida, thereupon petitioned the Florida Supreme Court for its Writ of Certiorari to the Third District Court of Appeal of Florida.

On September 10, 1969, the Florida Supreme Court entered its Order Denying said Petition. On October 20, 1969, the Florida Supreme denied the Petition of the City of Miami Beach for Rehearing.

QUESTION PRESENTED

Is the failure of the Courts of a State to correctly apply the "fairly debatable rule" in zoning cases as established by this Court in **Village of Euclid v. Amber Realty Company**, 272 U.S. 365, an unconstitutional encroachment by the judiciary into the legislative powers of the City of Miami Beach, and a deprivation of the rights of your Petitioner, its residents, citizens and taxpayers of their rights under the Fourteenth Amendment of the Constitution of the United States?

How Federal Question Was Presented

The Federal question was raised in these proceedings by the Respondents' Complaint, (Appendix, Page 3) the pertinent portion of which reads as follows:

"6. The Plaintiffs' said property is wholly unsuited to the purposes for which it has been restricted by ordinance, and said ordinance restricting said property to single family residences is arbitrary, unconstitutional, confiscatory and void, and the restrictions placed upon Plaintiffs' property by said zoning ordinance limiting its use to single family residences bears no reasonable relation to the public health, safety or morals of the community, and that the same as applied to 'the Plaintiffs' property constitutes a taking of the Plaintiffs' property without due process of law, contrary to Section 12 of the Declaration of Rights of the Florida Constitution, and to Paragraph 1 of the 14th Amendment to the Constitution of the United States."

REASON FOR GRANTING WRIT OF CERTIORARI

I. The Challenged Decrees of the Third District Court of Appeal of the State of Florida Violate the Fourteenth Amendment of the United States Constitution.

II. The Reversal by the Third District Court of Appeal of the State of Florida, of the Decrees of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, In and For Dade County, Constitutes a Deprivation of the Rights of the Petitioner, its Residents, Citizens and Taxpayers, under the United States Constitution, and Deprives Them of the Due Process of Law Guaranteed by the Fourteenth Amendment.

Under the provision of Chapter 9837, Special Acts 1923, Laws of Florida, the Legislature provided:

> "For the purpose of promoting health, safety, morals and the general welfare of the City of Miami Beach, the City Council of said City . . . be and it is hereby empowered to regulate and restrict . . . the location and use of buildings, structures and land for trade, industry, residential or other purposes."
>
> For any or all of such purposes, it (the City Council) may divide the municipality into districts of such number, shape and area as may best suit and carry out the purposes of this Act . . . "
>
> "The City Council shall provide for the manner in which such regulations and restrictions, and the boundaries of such districts shall be determined, established and enforced, and from time to time, amend, supplement, or change . . . "

By the terms of this zoning ordinance, the Respondents' property was placed in an RA district, which is limited to single family residences.

The Circuit Court correctly held:

> "It thus appears that the reasonableness or unreasonableness of the existing zoning classification is fairly debatable and when this is made to appear, a Court ought not to substitute its judgment for the judgment of the City Council of the City of Miami Beach as to what is a proper classification of the subject property."

The Third District Court of Appeal of the State of Florida reversed the decree. It said:

> "To deny the relief sought herein, as in Kugel, would constitute spot zoning in reverse."

Such action by the Third District Court of Appeal of the State of Florida constitutes an unconstitutional encroachment by the judiciary into the legislative powers of the City Council of the City of Miami Beach and deprives the Petitioner, its residents, citizens and taxpayers, of the rights guaranteed to them under the Fourteenth Amendment to the United States Constitution.

This Court has held that the judiciary may not encroach upon, or interfere with, the proper exercise of the constitutional powers of the Legislature. **State of Alabama v. Sate of Texas,** 347 U.S. 272; **State of Rhode Island v. State of Louisiana,** 347 U.S. 950; **Federal Radio Commission v. Nelson Brothers, etc. Co.,** 289 U.S. 266.

This Court, in **Village of Euclid v. Ambler Realty Company,** 272 U.S. 365, said:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. **Radice v. New York,** 264 U.S. 292, 294."

The "fairly debatable rule" has become virtually a rule of property. The alteration of zoning boundaries lines inevitably results in material and substantial changes in property values. Unfortunately, the increment to one

property owner is gained only as a consequence of the damage to the adjoining property. Such is the case here. The enhancement to the Respondents' property by rezoning it from single family residence use to apartment or hotel use is gained only as the result of immeasurable damage to the entire Use District which remains residential.

The failure of the Third District Court of Appeal of the State of Florida to apply the "fairly debatable rule" deprives the affected citizens, residents and taxpayers of the City of Miami Beach of a valuable property right guaranteed to them by the United States Constitution, and is one which may not be taken away without due process of law.

The City of Miami Beach is not only authorized and empowered to assert its property right for and on behalf of its citizens, residents and taxpayers, but is, intended, under a causitive duty, so to do.

As stated in **Muncie Naural Gas Co. v. City of Muncie,** 160 Ind. 97, 66 N.E. 436, at 438:

> " . . . it may be affirmed that it is not necessary to show that the City has itself sustained damage when it sues for the benefit of its inhabitants, but that it is enough to show that the act tends to injure the public of the municipality." See also, **City of Saginaw v. Consumers' Power Co., 213 Mich. 460, 182 N.W. 146 at 154.**

CONCLUSION

The Legislature of the State of Florida vested the City Council of the City of Miami Beach with the exclusive power and adjudication to fix, by legislative enactment, the lines or boundaries which define and separate the various uses to which land in the City may be put. This power was duly and properly exercised by the City Council. Notwithstanding, the Third District Court of Appeal of Florida usurped this power by attempting to nullify and erase the legislative lines drawn by the City Council. This is an unconstitutional usurpation of the legislative power of the City Council and this action should be set aside and annulled.

Respectfully submitted,

RAPHAEL STEINHARDT
66 West Flagler Street
Miami, Florida
Attorney for Petitioner

Of Counsel:
JOSEPH A. WANICK
City Attorney, and
JOEL R. TEAGUE
Assistant City Attorney
City Hall, 1130 Washington Avenue
Miami Beach, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Petition for Writ of Certiorari and Appendix thereto has been served by mail upon BRIGHAM and BRIGHAM, 846 Brickell Avenue, Miami, Florida 33131, and SIDNEY J. BERGER, 1502 DuPont Building, Miami, Florida 33131, Attorneys for Respondents, this____day of January 1970.

_____

APPENDIX

APPENDIX

[TITLE OMITTED]

COMPLAINT

NATHAN MANILOW, and SAMUEL J. KANNER, as Trustee, Plaintiffs, bring this Complaint against the CITY OF MIAMI BEACH, a municipal corporation of Dade County, Florida, Defendant, for that:

1. The Plaintiff, NATHAN MANILOW, is the owner of the following described property suitable, lying and being within the municipal limits of the Defendant City:

> Lots 1, 2, 3 and 4, FLAMINGO BAY SUB NO. 1, according to the plat therof as recorded in Plat Book 6, Page 101, of the Public Records of Dade County, Florida;
>
> Less the following described portion of Lot 1:
>
> Begin at a point of crossing of the tangents of a circular curve, having a central angle of 93° 30′, a radius of 15 feet; said tangents being the northerly line of 41st Street extended westerly, and easterly line of Pine Tree Drive extended southerly, as same is on FLAMINGO BAY SUB NO. 1, Plat Book 6, Page 101; thence run easterly along the tangent of said curve, or westerly projection of 41st Street a distance of 15.945 feet to point of curvature of said circular curve or point of beginning of tract of land herein described:

From said point of beginning run northwesterly along arc of a circular curve deflecting to the right, having for its elements a central angle of 63° 26′ 05.8″ a radius of 15 feet a distance of 16.072 feet to a point, (chord of said curve making an angle from tangent to chord of 31° 43′ 02.9″, and having a length of 15.772 feet) said point being the crossing of the arc of said curve with a line parallel to and 7.5 feet north from northerly line of 41st Street or southerly line of said Lot 1, FLAMINGO BAY SUB NO. 1, thence run easterly along a line parallel to and 7.5 feet distant northerly from southerly line of said Lot 1, FLAMINGO BAY SUB NO. 1, said 7.5 feet being measured at right angles to said southerly line of Lot 1, FLAMINGO BAY SUB NO. 1, a distance of 392.504 feet to a point, said point being 395.0′ easterly from the tangent of said curve on easterly line of Pine Tree Drive, extended southerly; thence run southeasterly along a line deflecting to the right 8° 40′ 15″, a distance of 40.253 feet to a point on the water face of concrete bulkhead on westerly shore of Indian Creek; thence run southwesterly along a line deflecting 85° 21′ 25″ to right, along water face of concrete bulkhead on westerly shore of Indian Creek, a distance of 1.435 feet to a point, said point being crossing of water face of concrete bulkhead on westerly shore of Indian Creek with southerly line of said Lot 1, FLAMINGO BAY SUB NO. 1; thence run along a line deflecting to right 85° 58′ 20″, along southerly line of said Lot 1, FLAMINGO BAY SUB NO. 1, or northerly line of said 41st Street, a distance of 419.206 feet to point of beginning.

2. That the Plaintiff, SAMUEL J. KANNER, holds an interest of record, as Trustee, in said lots for the said Plaintiff, NATHAN MANILOW, but the said NATHAN MANILOW is the equitable owner of said described property, and the Plaintiff, SAMUEL J. KANNER, has no beneficial interest in said property and holds the same for and subject to the direction of the Plaintiff, NATHAN MANILOW, as his Trustee;

3. The Defendant, CITY OF MIAMI BEACH, is a municipal corporation in Dade County, Florida, duly organized and existing under the laws of the State of Florida;

4. The said described property is located on the northeast corner of Pine Tree Drive and Arthur Godfrey Road in the Defendant City, as shown on the map or plat of the same hereto attached as Exhibit "A", and by reference made a part hereof;

5. The Defendant City, by its Ordinance No. 289, as amended, has placed a zoning classification upon said described property, which prohibits its use for anything other than single family residences, such zoning being designated in said Ordinance as RA, and said RA district requires 30,000 square feet of lot area per family;

6. The Plaintiffs' said property is wholly unsuited to the purposes for which it has been restricted by ordinance, and said ordinance restricting said property to single family residences is arbitrary, unconstitutional, confiscatory and void, and the restriction placed upon the Plaintiffs' property by said zoning ordinance limiting its

use to single family residences bears no reasonable relation to the public health, safety or morals of the community, and that the same as applied to the Plaintiffs' property constitutes a taking of the Plaintiffs' property without due process of law, contrary to Section 12 of the Declaration of Rights of the Florida Constitution, and to Paragraph 1 of the 14th Amendment to the Constitution of the United States;

7. The Plaintiffs have exhausted their administrative remedies with the Defendant City;

8. The Plaintiffs' property is bounded on the east by Indian Creek; on the west by Pine Tree Drive; and on the south by Arthur Godfrey Road. Across Arthur Godfrey Road is the Moulin Rouge Motel in an RE zoning classification, which is multiple family use. That at the southeast corner of Arthur Godfrey Road and Pine Tree Drive is a large A&P supermarket in a business district known as BA. That across Pine Tree Drive to the east of the Plaintiffs' property is BAA zoning and BE zoning, which permits multiple family use and business use, as shown by the airplane photograph of said property and its surrounding neighborhood attached to this Complaint as Exhibit "B", and by reference made a part hereof.

WHEREFORE, the premises considered, it is respectfully prayed:

1. That the Court decree the Defendant City's zoning Ordinance No. 289, as applied to Plaintiffs' said property, void and unconstitutional;

2. That the Defendant City be enjoined and restrained from enforcing RA single family use zoning against Plaintiffs' said property;

3. That the Defendant City be required on a short date specified in the final decree to rezone Plaintiffs' said property to a use consistent with the facts and circumstances of this case, and to report the same to the Court within a reasonable time;

4. That the Court retain jurisdicton of this cause for the purpose of determining upon Plaintiffs' petition filed therefor whether said zoning is legal and property and in accordance with the facts and circumstances of this case.

SIDNEY J. BERGER; and

BRIGHAM, SMITH & FORBES
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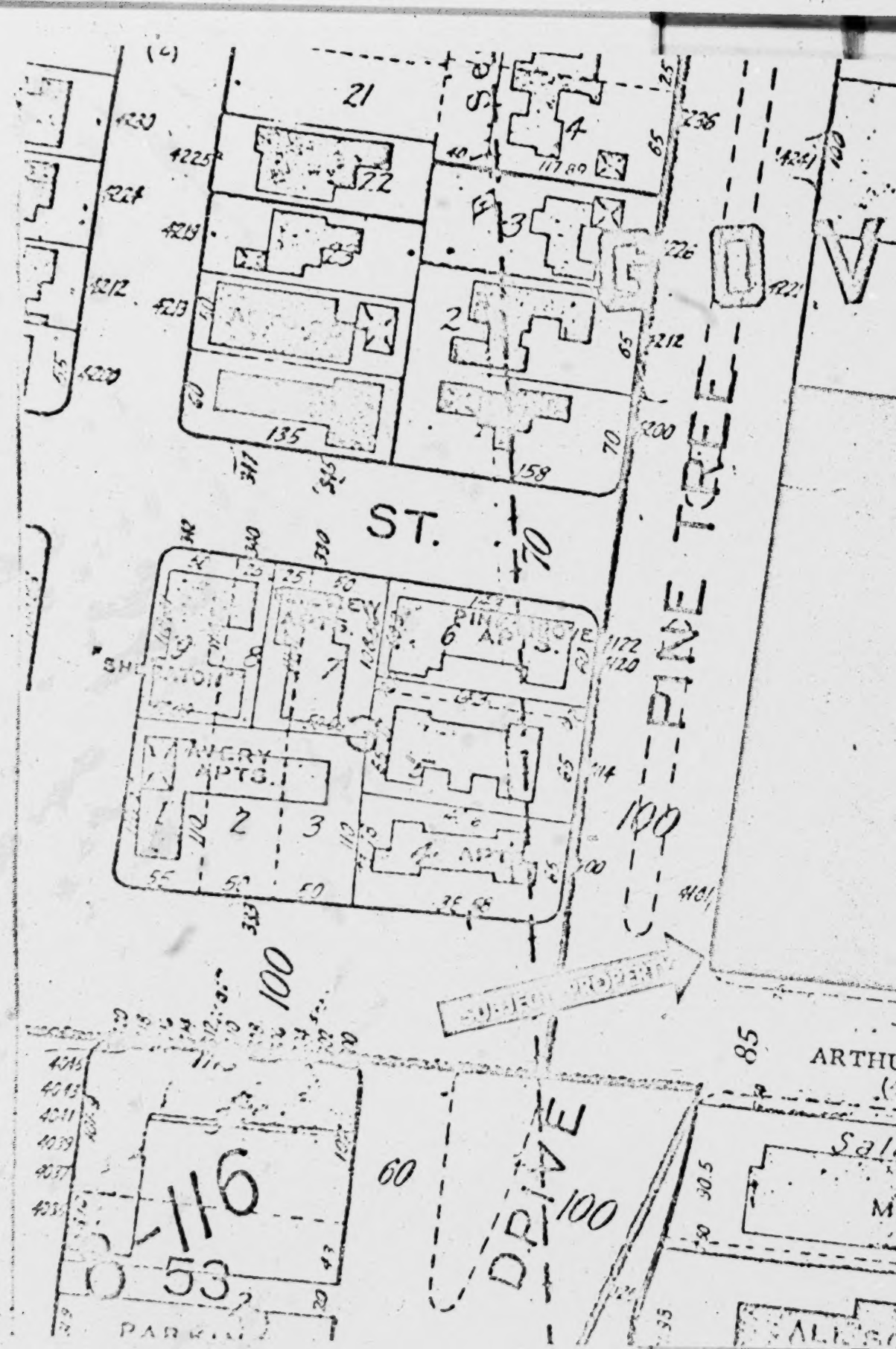
846 Brickell Avenue
Miami, Florida 33131
Attorneys for Plaintiffs

By /s/ Sidney J. Berger
Of Counsel

By /s/ E. F. P. Brigham
Of Counsel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INDIAN CREEK
Exhibit "A"
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da, Inc.
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[TITLE OMITTED]

AMENDMENT TO COMPLAINT TO COMPLY WITH ORDER OF COURT FOR MORE DEFINITE STATEMENT

COME NOW the Plaintiffs, NATHAN MANILOW, and SAMUEL J. KANNER, as Trustee, by and through their undersigned attorneys and, pursuant to the Order of the Court requiring a more definite statement, file the following paragraphs to be added as paragraphs to their Complaint previously filed in this cause:

9. The Plaintiffs have exhausted their administrative remedies by applying to the City Council of Miami Beach for a district boundary change as to the subject property, pursuant to Section 21 of Ordinance 289 of the City of Miami Beach. By this application the Plaintiffs sought to have their property rezoned from RA Estate District to RE Multiple Family District. A public hearing was held on October 12, 1965, pursuant to Section 21 of Ordinance 289 and pursuant to notice as required by said section. At said hearing the City Council voted 6-0, with one abstention, to deny the Plaintiffs' application for a district boundary change. The zoning ordinance of the City of Miami Beach gives the City Council of that City the sole and exclusive authority to change district boundaries established by said ordinance. Said zoning ordinance provides no other administrative remedy to which Plaintiffs could resort in this instance. A copy of sections 21 and 22 of Ordinance 289 of the City of Miami Beach are attached hereto marked Composite Exhibit "C", and by reference made a part hereof;

10. City Ordinance 289 of the City of Miami Beach, as applied to the Plaintiffs' property, permits said property, to be used only for single family residential purposes. As it allows only such residential use of said property the said ordinance, as so applied, is unconstitutional, confiscatory and void, and constitutes a taking of Plaintiffs' property without due process of law for the reasons that:

A. As so applied, said ordinance deprives the Plaintiffs of any beneficial use of their property since it is wholly unfit and unsuitable for single family residential purposes of any kind;

B. Said property borders on and is directly up against one of the main and most heavily traveled thoroughfares in the City of Miami Beach and Dade County. This thoroughfare is the link between the principal hotels of Miami Beach and the Julia Tuttle Causeway, I-95 Interstate Highway and the Airport Expressway, which have been constructed since the Plaintiffs' property was zoned for single family residential purposes. Pine Tree Drive, bordering Plaintiffs' property to the west, is one of the principal north-south thoroughfares in Miami Beach. The traffic, noise, fumes and danger produced by said traffic on these thoroughfares adjoining Plaintiffs' property are excessive every hour of the day or night. These circumstances cause said property to be totally unfit and unsuitable for any kind of single family residential purpose;

C. The Moulin Rouge Motel is located across the street to the south of Plaintiffs' property; an A&P Supermarket is located across the intersection to the southwest of Plaintiffs' property; and the Jefferson National Bank,

an office building and apartments are located across Pine Tree Drive to the west of Plaintiffs' property; these uses and circumstances surrounding Plaintiffs' property cause said property to be totally unfit and unsuitable for any kind of single family residential purpose;

D. Changed conditions and growth in the area in which the Plaintiffs' property is located, since the Plaintiffs' property was zoned for single family residential purposes, cause said property to be totally unfit and unsuitable for any kind of single family residential purpose;

E. The RA Estate zoning of said property is not necessary and bears no reasonable relation to the public health, safety, morals or general welfare.

SIDNEY J. BERGER; and
BRIGHAM, SMITH & FORBES
Brigham Building
846 Brickell Avenue
Miami, Florida 33131
Attorneys for Plaintiffs

By E. F. P. BRIGHAM
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy hereof was hand-delivered this 3rd day of March, 1967, to Joseph A. Wanick, Esq., City Attorney, City of Miami Beach, 1130 Washington Avenue, Miami Beach, Florida, Attorney for Defendant.

E. F. P. BRIGHAM

COMPOSITE EXHIBIT "C"

SECTION 21.

CHANGES AND AMENDMENTS

Upon its own initiative, or upon the petition of the owners of a majority of frontage in any area, the City Council may, after having held a public hearing following at least fifteen (15) days notice of time, place and object of such hearing published in an official paper, or a paper of general circulation in said City of Miami Beach, amend, supplement, change, modify or repeal the regulations and boundaries herein established, provided, however, that no amendment shall become effective except by the favorable vote of five-sevenths (5/7ths) of all the members of the City Council. And, provided further, that if the hearing is to be on the question of a change in the boundaries herein established then such fifteen (15) days notice shall be given by mail to the owners of record of land lying within 375 feet of the land the boundaries of which are proposed to be changed.

The provisions relative to public hearings and official notices shall apply equally to all changes or amendments. (742) (1100)

Any petitioner requesting and obtaining a public hearing on an application for change of zoning or other amendment to this ordinance shall pay, upon the adoption of the resolution calling the public hearing required hereby, the sum of Twenty-five ($25.00) Dollars as costs of publishing and mailing the notices required by this section. (1313)

COMPOSITE EXHIBIT "C"

SECTION 22.

ADJUSTMENTS, PURPOSE, JURISDICTION AND APPROVAL

A Board of Adjustment is hereby established. The word "Board" when used in this ordinance shall be construed to mean the Board of Adjustment.

The Board shall consist of five (5) members appointed by the City Council, each for a term of three (3) years.

Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of this ordinance, the Board of Adjustment shall have the power in passing upon appeals, to vary or modify any regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures, or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.

The Board shall not vary or modify any regulation or provision of this Ordinance until a public hearing has been held. Notice of such hearing shall be given by mail to the owners of record of land lying within 375 feet of the property the use, construction or alteration of which is proposed to be changed.

COMPOSITE EXHIBIT "C"

Meetings of the Board shall be held at least once monthly, or at such other times as the Board may determine, or upon call of the chairman. All meetings of the Board shall be open to the public. The Board shall adopt its own rules or procedure and keep minutes of its proceedings showing its action on each question considered. All records of the Board and its official actions shall be filed in the office of the Board and shall be a public record.

An appeal from the decision of the Administrative Offices may be taken to the Board of Adjustment by any person aggrieved, or by any officer, department or board of the City affected by such decision. The Board shall also hear and decide all matters referred to it, or upon which it is required to pass.

The Board shall prescribe by general rule, a reasonable time within which a notice of appeal shall be filed with the Board specifying the grounds thereof, and the officer from whom the appeal is taken shall forthwith transmit to the Board all the papers constituting the records upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certified to the Board of Adjustment after the notice of appeal shall have been filed with him, that by reason of facts stated in the certificate, a stay would, in his opinion, cause imminent peril of life or property, in case proceedings shall not be stayed other-

wise than by a restraining order, which may be granted by the Board of Adjustment or by a court of record on application, on notice to the officer from whom the appeal is taken and on due cause shown.

The Board shall fix a reasonable time for the hearing ing of the appeal taken within the time specified by its rules, give public notice thereof as well as due notice to the parties in interest, and decide same within a reasonable time. Upon the hearing, any person may appear in person or by agent or by attorney.

The concurring vote of four (4) members of the Board of Adjustment shall be necessary to reverse any order, requirement, decision or determination of any administrative official, or to decide in favor of the applicant any matter in which it is required to pass under this Ordinance, or to effect variation in this ordinance. (1290)

Any person requesting and obtaining a public hearing on an application for a variance before the Board shall pay, upon the adoption of a motion or resolution calling a public hearing, the sum of $25.00 as costs to defray the expense of public notices and other administrative costs in connection with said hearing. (1511)

ANSWER

[TITLE OMITTED]

The Defendant, CITY OF MIAMI BEACH, for answer to the Complaint herein, says:

1. It is without knowledge of the truth of the allegations in Paragraph 1 and therefore denies the same.

2. It is without knowledge of the truth of the allegations in Paragraph 2 and therefore denies the same.

3. Defendant admits the allegations in Paragraph 3.

4. Defendant denies the allegations in Paragraph 4.

5. It admits that the "RA" District requires 30,000 square feet of lot area per family. It denies the remaining allegations of Paragraph 5.

6. It denies the allegations of Paragraph 6.

7. It denies the allegations of Paragraph 7.

8. It admits the allegation that Plaintiffs' property is bounded on the East by Indian Creek, on the West by Pine Tree Drive and on the south by Arthur Godfrey Road; it further alleges that said property is bounded on the North by a continuous uninterrupted stretch of land extending to 63rd Street and improved by beautiful, expensive estates with no natural barrier to serve as a line of demarcation, and that the value of said single family estates would be destroyed for such use in the event of the rezoning of Plaintiffs' property. It denies the remaining allegations of Paragraph 8.

9. It denies that the Plaintiffs have exhausted their administrative remedies. It denies that said ordinance provides no other administrative remedies. It admits the remaining allegations in Paragraph 9, except the allegation that a public hearing was held on October 12, 1965 and alleges that said public hearing was held on October 12, 1966.

10. It denies the allegations of Paragraph 10.

11. For further answer to the Complaint herein, as amended, the Defendant says that the Plaintiffs are seeking a change of zoning not of one lot, but of a large parcel of land consisting of four (4) lots having a frontage of one hundred (100') feet each on Indian Creek, a waterway unparalleled for its beauty, and upon Pine Tree Drive, which is one of the most attractive and scenic public ways in South Florida. That the existing zoning is reasonable and bears an essential relationship to the general welfare. That a rezoning of the Plaintiffs' property as prayed would create a congestion in the streets and traffic dangers and hazards of the greatest magnitude and would threaten public safety from fire, panic and other dangers. That a rezoning of the said property would deprive the entire area of adequate light and air; and would overcrowd the land and would cause a dangerous concentration of population of such high density as to endanger the health of the community. That a rezoning of said property would destroy the entire residential character of the neighborhood and would create conditions which, by an erosive process, would destroy the single family estate zoning from 41st Street to 63rd Street. That a rezoning of said property would create a species of spot zoning in its worst form.

12. For further answer to the Complaint Defendant says that the existing zoning of Plaintiffs' land is part of a comprehensive zoning plan for the City of Miami Beach and that a destruction of the same would destroy the estate style of living which is required for a well rounded community like the City of Miami Beach. That the said property is heartily suitable for single family use fronting as it does on Indian Creek and abutting on Pine Tree Drive. That a rezoning of said property would destroy the scenic value of Pine Tree Drive and transform it into an overcrowded arterial highway.

13. For further answer to the Complaint herein the Defendant says that all of the matters, things and issues involved in this cause have been heretofore adjudicated, settled and determined by the final decree of this Court entered in that certain cause entitled Richard Gimbel, et al, as Plaintiffs and the City of Miami Beach, the Defendant herein, as Defendant, said case being number 139139H in the records of this Court, wherein said issues were found against Plaintiffs and in favor of the Defendant. That the Decree in said cause was thereafter duly affirmed by the Florida Supreme Court.

JOSEPH A. WANICK
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing Answer has been served by mail upon SIDNEY J. BERGER, and BRIGHAM, SMITH & FORBES, ESQS., Attorneys for Plaintiffs, 846 Brickell Avenue, Miami, Florida, this 22nd day of March, 1967.

[TITLE OMITTED]

FINAL JUDGMENT

The Order of this Court entered in this cause on June 5, 1967, duly recorded June 8, 1967 in Circuit Court Minute Book 837, at Page 341, having been reversed by the opinion and judgment of the District Court of Appeal of Florida, Third District, of August 6, 1968, and the Mandate of that Court having been duly filed in this cause with the Clerk of this Court on the 17th day of September, 1968, and Plaintiff, NATHAN MANILOW, having duly filed his Motion for a final judgment in accordance with the opinion and Mandate of said District Court, and it appearing to the Court from the Stipulation of the parties filed in this cause that the Plaintiff, NATHAN MANILOW, is the only real party in interest and there is no necessity for the Executor of SAMUEL J. KANNER, now deceased, to be made a party to this proceeding; now, therefore, it is,

CONSIDERED, ORDERED and ADJUDGED:

1. That said Order of this Court of June 5, 1967, be and the same is hereby set aside and held for naught;

2. That Plaintiff's property involved in this action is legally described as follows:

> Lots 1, 2, 3 and 4, FLAMINGO BAY SUB NO. 1, according to the plat thereof as recorded in Plat Book 6, Page 101, of the Public Records of Dade County, Florida;

Less the following described portion of Lot 1:

Begin at a point of crossing of the tangents of a circular curve, having a central angle of 93° 30′, a radius of 15 feet; said tangents being the northerly line of 41st Street extended westerly, and easterly line of Pine Tree Drive extended southerly, as same is on FLAMINGO BAY SUB NO. 1, Plat Book 6, Page 101; thence run easterly along the tangent of said curve, or westerly projection of 41st Street a distance of 15.945 feet to point of curvature of said circular curve or point of beginning of tract of land herein described:

From said point of beginning run northwesterly along arc of a circular curve deflecting to the right, having for its elements a central angle of 63° 26′ 05.8″ a radius of 15 feet a distance of 16.072 feet to a point, (chord of said curve making an angle from tangent to chord of 31° 43′ 02.9″, and having a length of 15.772 feet) said point being the crossing of the arc of said curve with a line parallel to and 7.5 feet north from northerly line of 41st Street or southerly line of said Lot 1, FLAMINGO BAY SUB NO. 1, thence run easterly along a line parallel to and 7.5 feet distant northerly from southerly line of said Lot 1, FLAMINGO BAY SUB NO. 1, said 7.5 feet being measured at right angles to said southerly line of Lot 1, FLAMINGO BAY SUB NO. 1, a distance of 392.504 feet to a point, said point being 395.0′ easterly from the tangent of said curve on easterly line of Pine Tree Drive, extended southerly; thence run southeasterly along a line deflecting to

the right 8° 40′ 15″, a distance of 40.253 feet to a point on the water face of concrete bulkhead on westerly shore of Indian Creek; thence run southwesterly along a line deflecting 85° 21′ 25″ to right, along water face of concrete bulkhead on westerly shore of Indian Creek, a distance of 1.435 feet to a point, said point being crossing of water face of concrete bulkhead on westerly shore of Indian Creek with southerly line of said Lot 1, FLAMINGO BAY SUB NO. 1; thence run along a line deflecting to right 85° 58′ 20″, along southerly line of said Lot 1, FLAMINGO BAY SUB NO. 1, or northerly line of said 41st Street, a distance of 419.206 feet to point of beginning;

3. That Plaintiff's said property is unsuitable for use under a single family residence classification imposed upon it by Defendant's Zoning Ordinance No. 289, and that as applied by the Defendant to Plaintiff's property said Ordinance is arbitrary and void, and contrary to Section 12 of the Declaration of Rights of the Florida Constitution;

4. That it would be arbitrary and unreasonable for Defendant to impose upon Plaintiff's said property a zoning classification more restrictive than RE multiple family zoning, as defined in Defendant's said Zoning Ordinance No. 289;

5. That the Defendant City be and it is hereby enjoined from enforcing in any manner against Plaintiff's said property a single family RA zoning classification specified in Defendant's Zoning Ordinance 289, and from

imposing against Plaintiff's property a zoning more restrictive than RE multiple family zoning as defined in said Zoning Ordinance;

6. That the Defendant City within ten days from the date of this Order amend its said Zoning Ordinance No. 289 applicable to the Plaintiff's said property so as to remove Plaintiff's said property from its present RA estate district zoning classification and place the same in a zoning classification specified in said zoning ordinance not more restrictive than that now provided in RE multiple family district classification contained in said ordinance;

7. That the costs of this action be and they are hereby taxed against the Defendant in an amount to be determined by this Court upon motion therefor, and when determined shall be deemed a part of this judgment;

8. That this Court retains jurisdiction of this cause for the purpose of enforcing this decree, for the entry of costs, and to determine upon Plaintiff's motion filed therefor whether said rezoning of the Plaintiff's property by the Defendant, as ordered herein, is legal and proper in accordance with the facts and circumstances of this case.

DONE and ORDERED at Miami, Dade County, Florida, this day of September, 1968.

_____

Circuit Judge

[TITLE OMITTED]

Opinion filed August 6, 1968.

An Appeal from the Circuit Court for Dade County, John J. Kehoe, Judge.

Brigham & Brigham; Sidney J. Berger, for appellants.

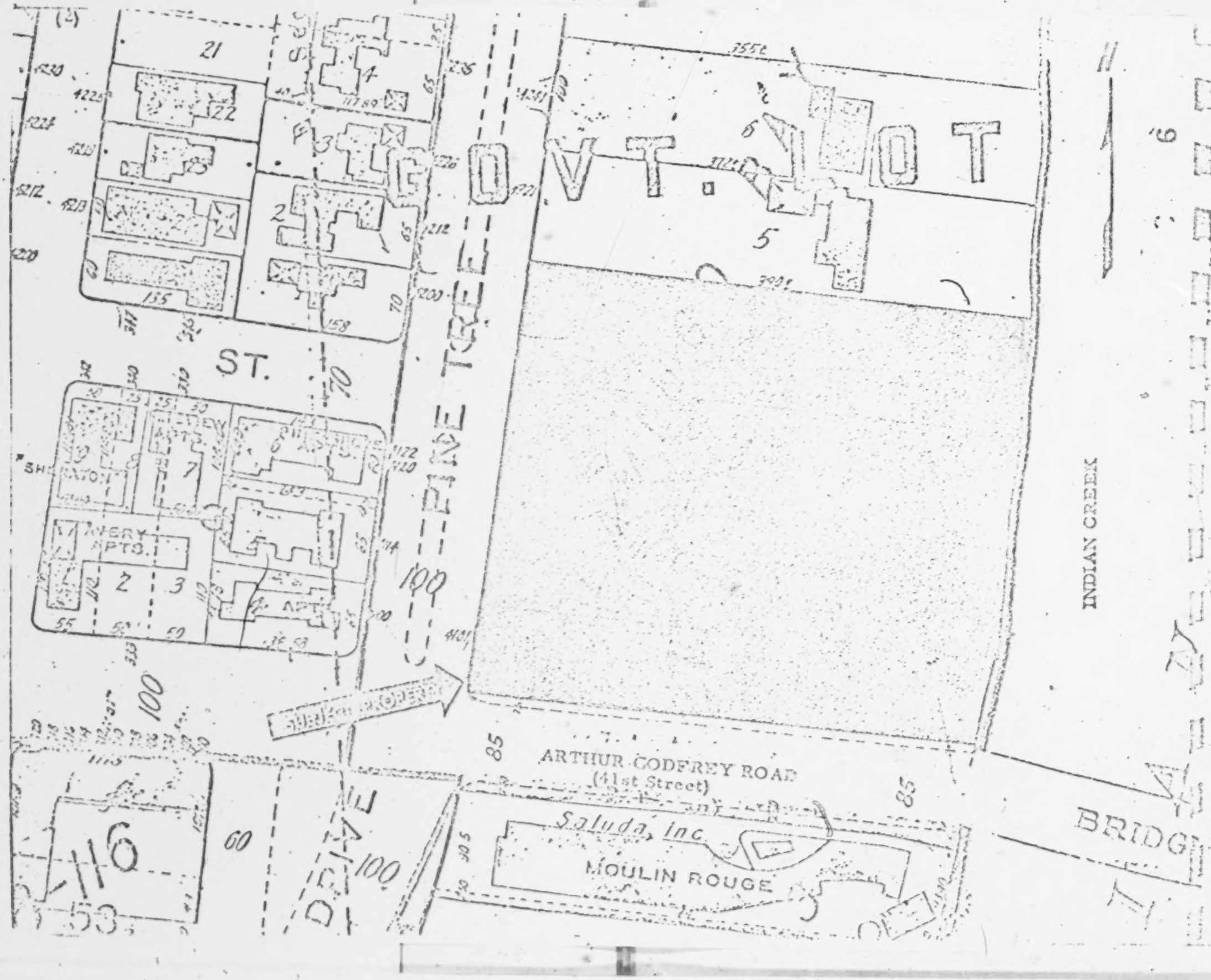
Joseph A. Wanick, City Attorney, for appellee.

Before CHARLES CARROLL, C.J., and HENDRY and SWANN, JJ.

PER CURIAM.

Appellants are the legal and beneficial owners of certain real property located in Miami Beach, Florida. It consists of Lots 1, 2, 3, and 4; Flamingo Bay Subdivision, Plat Book 6, Page 101, Public Records of Dade County, Florida and occupies the northeast corner of the intersection of Arthur Godfrey Road and Pine Tree Drive; lying against Indian Creek on the east; and a single family residence on the north. The lots all have approximately 100 ft. frontage on Pine Tree Drive and Lot One has a frontage of approximately 385 feet on Arthur Godfrey Road. The property has been zoned for single family residence use since 1930, 38 years, under the Miami Beach Zoning Ordinance. In 1951, Gimbel, then owner of Lot One, attempted to obtain relief from the single family zoning restriction on the use of the property in the Circuit Court of Dade County. The relief was denied.

In January 1967, the present owners filed the instant action seeking, inter alia, a court decree that the city zoning ordinance was void, arbitrary and unconstitutional as it applied to their property. The defendant, City of Miami Beach, answered with general denials and pled various affirmative defenses, including a plea of res judicata. After extensive hearings and argument, the trial court denied plaintiff the relief sought and also ruled that the City had failed to prove its plea of res judicata. The owners have appealed and the city has cross assigned as error the denial of its plea of res judicata. A copy of the plat of the subject property is shown as "Exhibit A."


ST.
ARTHUR GODFREY ROAD
(41st Street)
Saluda, Inc.
MOULIN ROUGE
INDIAN CREEK
BRIDG
21
22
23
4
3
2
1
5
6
7
135
158
70
100
85
60
55
50
33
30
25
20
15
10
5
0

An aerial photograph of the subject property and intersection is reflected in plaintiff's Exhibit Five.

Plaintiffs'
Exhibit 5

The record on appeal reflects that immediately south of this property and across Arthur Godfrey Road is a four story motel, the Moulin Rouge, with its parking lot and entrance directly across from the subject property. Immediately south of the motel is a large, attractive church building. Its parking lot lies next to property which is zoned and used for single family residences. A comparison of the exhibits submitted in the Gimbels' suit in 1951 with those showing the present situation indicates that single family residences had to be demolished for the construction of the motel and church. The city in 1950 changed the single family zoning on the motel and church property to RE multiple family zoning. This change to RE permits high rise apartments, motels and churches to be constructed immediately south of plaintiff's property. For a discussion of the difference involved in motel vs. high rise apartment houses see **City of Miam v. Zorovich,** Fla.App.1967, 195 So.2d 31.

On the southwest corner of the intersection of Arthur Godfrey Road and Pine Tree Drive there is a large A & P grocery store. The city passed two ordinances which changed and liberalized this zoning to permit a grocery store use. A large parking lot lies south of and adjacent to the grocery store.

On the northwest corner of the intersection is the Jefferson National Bank. In 1955, the city changed the zoning on this corner from RE multiple family to permit banks in that particular use zone. Recently the bank was granted permission to add three additional stories to its present building. **City of Miami Beach v. Courshon,** Fla. App.1968, —So.2d—. (Opinion filed July 16, 1968, 3rd D.C.A., Case No. 67-965)

In 1966, the city changed the commercial zoning on the property adjoining the bank on the west to permit the construction of the nine story Midtown Medical Center office building. It is fully occupied today and its ground floor is occupied by a large modern drug store and stock brokerage office. Parking for the bank is through a driveway directly west of plaintiff's property.

In December, 1959, the Julia Tuttle Causeway was officially opened to traffic. It is now the primary traffic artery from the Miami International Airport to Miami Beach and was not in existence in 1951 when the Gimbels' suit was filed. The bridge across Indian Creek was then a narrow two lane bridge but is now a modern five lane bridge accommodating large amounts of traffic both day and night. There was testimony that the traffic flow passing plaintiff's property had increased 100% since the opening of the causeway. Thus, plaintiff's property on the northeast corner of the intersection is zoned for single family residences. On the southeast corner is a large motel; on the southwest corner is a large super market; on the northwest corner is a large modern bank; and all of these commercial establishments have their attendant driveways, parking areas, and traffic problems for their commercial clients. Plaintiff's property on the south faces on one of the major traffic arteries between Miami and Miami Beach, which is used for business purposes practically in its entirety, except for plaintiff's property. The property is then, except for the northernmost part, similar to the "veritable island" with which the Supreme Court of Florida was faced in **Tollius v. City of Miami,** Fla.1957, 96 So.2d 122. The court therein held:

> "It may be that when the zoning ordinance was passed the need existed and the legislative act could not have been defeated or thwarted because then it could have been fairly debated. But the need twenty years [here thirty-eight years] later seems to have been so dissipated by the intervening phenomenal growth of the City of Miami [Miami Beach] that it is now so out of proportion to the interference with the use of the appellant's property that the exercise of the police power cannot be upheld." [Id at 96 So.2d 126, brackets ours].

The factual situation herein is quite similar to that of **Kugel v. City of Miami Beach**, Fla.App.1968, 206 So.2d 282, 284, 285, where this court stated that "the changes in the area have resulted in a large concentration of non-residential activity in a residential area" and "that the character of the property has already been changed by other actions of a municipality". We will not add to this opinion with the other similarities in Kugel. The court there held that "where changed conditions create a situation where the zoning of appellant's property is so unreasonable as to constitute a taking of his property", then the courts are justified in striking down the arbitrary zoning classification. [Id at 206 So.2d 284] See also **Burritt v. Harris**, Fla.1965, 172 So.2d 820; **Tollius v. City of Miami**, Fla.1957, 96 So.2d 122; **Forde v. City of Miami Beach**, 146 Fla. 676, 1 So.2d 642 (1941); **Town of Surfside v. Andrews**, Fla.App.1967, 193 So.2d 207; **Shearer v. Metropolitan Dade County**, Fla.App.1966, 189 So.2d 501; **Town of Palm Beach v. Leach**, Fla.App.1966, 186 So.2d 743; **Watson v. Mayflower Property, Inc.**, Fla.App.1965, 177 So.2d 355; and **Lawley v. Town of Golfview**, Fla.App.1965, 174 So.2d 767.

The rationale applied in Kugel, supra., appears to be appropriate here. To deny the relief sought herein, as in Kugel, would constitute spot zoning in reverse. See **Smith & DeMaris Investing Co. v. City of Miami Beach**, Fla. App.1968, — So.2d —. (Opinion filed August 6, 1968, 3rd D.C.A., Case No. 67-549)

The plaintiff herein has shown a material change in circumstances since the denial of relief in the Gimbels' suit in 1951. See **City of Miami Beach v. Prevatt**, Fla. 1957, 97 So.2d 473; **City of Miami Beach v. Parking Facilities, Inc.**, Fla.App. 1960, 120 So.2d 209.

The record reflects that plaintiff carried the burden of showing that this property was unsuitable for use under a single family residence classification and that it would be arbitrary and unreasonable to impose on this property a zoning classification more restrictive than RE multiple family zoning; which is equal to, or less than, the zoning on the other three corners of this intersection.

We have considered the other points on appeal and find them to be without merit.

The judgment appealed is reversed and the cause remanded for further action consistent herewith.

[TITLE OMITTED]

ORDER

On May 22, 1967, this cause was first heard. At that time a transcript of the record of 217 pages was prepared. The case was additionally heard for one half day on May

29 at which time it was estimated that the transcript of record would approximate 120 pages. The plaintiff offered three witnesses on direct and two witnesses in rebuttal and offered in evidence some 22 exhibits. The defendant produced ten witnesses and offered in evidence some five exhibits.

At the conclusion of the May 29 hearing, the court was favored with extensive arguments by attorneys for the respective parties and thereafter the attorney for the plaintiff submitted to the court a written brief and on June 2 submitted to the court a supplemental brief in support of the plaintiff's contentions. The defendant likewise submitted a brief in support of its position as to the point that the action of the City Council in refusing to rezone this property was not arbitrary or confiscatory and further contended that the question of rezoning was a fairly debatable question.

The defendant interposed, as a defense to the plaintiff's action, a plea of res judicata. This contention of the plaintiff is not supported either in fact or by law. The basic contention in this regard of the defendant is that in the year 1951 a former owner of Lot 1 of the properties here involved, sought a rezoning change and that this application for a rezoning of Lot 1 was denied. It is the opinion of the court that neither the facts of the 1951 case nor the law application to res judicata is applicable in this situation. In support of its plea of res judicata the defendant tendered into evidence, as defendant's exhibit E, the pertinent parts of the 1951 law suit. It is the holding of this court that the defendant has not substantiated its plea of res judicata.

As a further defense interposed to the plaintiff's law suit, the defendant contends that the plaintiff has not exhausted its administrative remedies. This contention is without merit. Section 21 of the Zoning Ordinance of the City of Miami Beach, Florida, plaintiff's exhibit 2, provides that upon its own initiative or upon the petition of owners of a majority of the frontage in any area, the city council may, after having held a public hearing following at least 15 days notice, amend, supplement, change, modify, or repeal the regulations and boundaries as contained in the zoning ordinance.

On October 12, 1964, the City Council of the City of Miami Beach, beginning at 11:00 a.m., heard the plaintiff in his plea for a rezoning of Lots 1, 2, 3 and 4 (see plaintiff's exhibit 4). After having heard all of the evidence that the plaintiff or petitioner offered in support of his plea for rezoning, the City Council of the City of Miami Beach unanimously voted to deny the application for a change of the zoning of Lots 1, 2, 3, 4 from RA classification to RE classification. In zoning matters from the legislative or administrative viewpoint, the City Council of the City of Miami Beach is the final authority to pass upon such applications for rezoning. It thus affirmatively appears that the plaintiff did exhaust its administrative remedies. This contention of the defendant is rejected and held to be without merit.

The properties sought to be rezoned are Lots 1, 2, 3 and 4, as described in plaintiff's exhibit 15. According to the plat, exhibit 15, there are 12 lots in this tract. Each of these lots have a frontage of 100′ on Pine Tree Drive (except Lot 1 - 85′) and they have a depth extending to Indian Creek of of various depths of from 350′ to 399′. The

plaintiff, in seeking to have Lots 1, 2, 3 and 4 rezoned to RE district which permits a high rise apartment, contends that the property in question is no longer fit for RA zoning classification which is a single family estate district. In support of this position, the plaintiff produced two witnesses; Mr. Ted Slack, Realtor, and Mr. J. N. Lummus, Jr., a Realtor. The court recognizes both of these gentlemen as having had extensive dealings with real properties throughout Dade County. Both of these gentlemen have, upon numerous occasions, appeared before the undersigned judge as witnesses in tax assessment cases, eminent domain proceedings and possibly zoning changes.

In opposition to the testimony offered by the plaintiff, the defendant offered the testimony of Mrs. Olive H. Wofford, the owner of Lot 5 who was occupying this premises as her home since 1942. The defendant also offered the testimony of Mr. Osmos who purchased the property at 4403 Pine Tree Drive in April of 1967, Lot 7 as a single family residence; also the testimony of Mr. Robert Green of 4411 Pine Tree Drive who has resided on that premises for 17 years; the testimony of Mrs. Morris, 4390 Pine Tree Drive, a 20-year resident; the testimony of Mr. Adelman, 4420 Pine Tree Drive, a resident since 1946; the testimony of a Mrs. Kappel who formerly resided on the west side of Collins Avenue and who has just recently purchased a home at 4855 Pine Tree Drive. All of these residents of the area vigorously opposed the placing of a high rise apartment on Lots 1, 2, 3 and 4. They all contended that it was their opinion that the property was well suited for single family estate homes.

The defendant also offered the testimony of a Mr. Wimbish and a Mr. Ratner. Both of these gentlemen are realtors of long standing and both are well known by the court. These two witnesses were positive in their testimony that the existing classification of the subject property was reasonable. The two realtors testifying for the plaintiff were likewise positive in their testimony that the present classification of the subject property was unreasonable.

Based upon the foregoing and from an examination of the pleadings, the exhibits and the court otherwise fully advised, the court makes the following rulings:

1. That the defendant has failed to substantiate its plea of res judicata;

2. That the defendant has failed to establish that the plaintiff had not exhausted his administrative remedies;

3. That the plaintiff is the owner of the property described in the complaint, namely, Lots 1, 2, 3, 4 as well as Lot 6.

That Lot 1 is bounded by 41 Street by Pine Tree Drive and Indian Creek. That Lots 2, 3 and 4 are bounded by Pine Tree Drive and Indian Creek.

The plaintiff attempted by his witnesses and their testimony to demonstrate why the existing classification of Lots 1, 2, 3 and 4 was unreasonable while the defendant by its witnesses with equal vigor attempted by their testimony to demonstrate the reasonableness of the existing classification.

"It thus appears that the reasonableness or unreasonableness of the existing zoning classification is fairly debatable and when this is made to appear, a court ought not to substitute its judgment for the judgment of the City Council of the City of Miami Beach as to what is a proper classification for the subject property.

The defendant municipality, as a whole, is zoned according to a comprehensive plan of zoning. Its primary objective was to avoid spot zoning and to maintain a comprehensive uniform plan of zoning for the benefit of the community as a whole and for the mutual benefit of the residents of the community. The acts of the City Council of the City of Miami Beach ought not to be disturbed by a court unless it be clearly shown that the acts of the city council in determining the use classification are unreasonably discriminating and bear no relation to the public welfare.

It follows that if the zoning classification assaulted by the plaintiff is fairly debatable it cannot be said that the zoning ordinance classifying plaintiff's property hfor use as a single estate residential property RA is unreasonable.

Plaintiff having failed to clearly establish the unreasonableness of the zoning ordinance of the defendant municipality as applied to the properties of the plaintiff involved in this litigation, it is

ORDERED, ADJUDGED and DECREED that the plaintiff's complaint be and the same is hereby dismissed."

It is further ORDERED, ADJUDGED and DECREED that each party bear his and its own costs.

DONE and ORDERED at Miami, Dade County, Florida, this 5th day of June, 1967.

JOHN J. KEHOE
CIRCUIT JUDGE

A copy of the above Order was mailed to:

E. F. P. Brigham, Esquire
Brigham Smith & Forbes
Brigham Building
846 Brickell Avenue
Miami, Florida 33131

Sidney J. Berger, Esquire
DuPont Building
Miami, Florida

Attorneys for Plaintiff

Joseph A. Wanick, Esquire
City Attorney
1130 Washington Avenue
Miami Beach, Florida

Attorney for Defendant

[TITLE OMITTED]

Counsel for appellee having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

SIGNATURE ILLEGIBLE
Clerk District Court of
Appeal, Third District

cc: Joseph A. Wanick
Brigham & Brigham
Sidney J. Berger

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA)

[TITLE OMITTED]

Opinion filed September 10, 1969

Writ of Certiorari to the District Court of Appeal, Third District

Joseph A. Wanick, Phillip Goldman and Scott, McCarthy, Steel, Hector & Davis, for Petitioner

Sidney J. Berger and E. F. P. Brigham of Brigham & Brigham, for Respondent

PER CURIAM.

Conflict certiorari having issued, and argument heard, we have considered the record and briefs, and it appearing that the District Court of Appeal properly dis-

posed of the case, their opinion and decision is adopted by this Court so the Writ of Certiorari having heretofore issued in this cause is —

Discharged.

CARLTON, ADKINS and BOYD, JJ., and MELVIN, Circuit Judge, concur

DREW, J., concurs specially with Opinion

ROBERTS, Acting Chief Justice, concurs in part and dissents in part with Opinion

MANN, District Court Judge, dissents

ROBERTS, Acting Chief Justice, dissenting in part and agreeing in part.

The history, background, questions involved and factual situation including a plat and photograph are set forth in the opinion of the District Court of Appeal, Third District, reported as 213 Southern 2nd 589 and it would serve no useful purpose to report them here. It will be observed that Manilow and Kanner as Trustees own Lots 1, 2, 3 and 4 Flamingo Bay Subdivision beginning with Lot 1 at the northeast corner of the intersection of Arthur Godfrey Road and Pine Tree Drive, having a frontage of ninety feet on Pine Tree Drive, and Lots 2, 3 and 4 each having a frontage of one hundred feet for a total frontage of 390 feet on Pine Tree Drive. All four lots are approximately 385 feet in depth bordering on Indian Creek. I have no difficulty agreeing with the

District Court that on the record here Lots 1 and 2 and perhaps 3 are no longer suitable for single family use, and that such a restriction is not fairly debatable. However, Lot 4 is 290 feet from the intersection and the holding of the District Court that Lot 4 is not fairly debatable produces a legal result in conflict with a long line of decisions of this and other Courts. In my opinion the use for Lot 4 is fairly debatable and therefore should be left to the zoning board. Perhaps if given such authority the board would establish some use that would serve as a buffer zone between the proposed high rise apartment and the beautiful estate area on Pine Tree Drive now existing immediately north of and adjacent to Lot 4 here involved. Such a buffer zone would serve to delay if not prevent the judicial erosion of the estate area zoning.

I would therefore approve that part of the decision sub judice as to Lots 1, 2 and 3, but disapprove as to Lot 4.

Accordingly we should quash that part of the decision relating to Lot 4 with directions that as to such lot, the trial Court be affirmed.

I therefore agree in part and disagree in part with the majority view.

DREW, J. — CONCURRING SPECIALLY

In **Euclid v. Ambler Realty Company**, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), the United States Supreme Court, for the first time, upheld the constitutional validity of a **comprehensive** zoning ordinance. While

up to that time some states had held to the contrary, the power of municipalities to adopt ordinances **comprehensively** zoning the territory within its limits is now universally recognized. Where particular hardships occur in the enforcement of such regulations, ordinances usually provide for the granting of special exceptions so that such hardships may be at least minimized without impairing the spirit of the legislative enactment. Special exceptions, however, may not be so broad as to amount to a rezoning, for that is a legislative decision.

The situation shown to exist in the neighborhood of the property involved here has been brought about partially by growth and increase of traffic but principally by the acts of the city itself in rezoning, not on a comprehensive or planned basis in the interest of the general welfare, but piecemeal, haphazard and possibly in a wholly arbitrary manner. The city now finds itself on the horns of a self-created dilemma with consequent chaos in the whole area, so far as zoning is concerned. This type of spot zoning has been universally condemned, but there is a parade of cases constantly coming to the courts evidencing a custom of replacing comprehensive, well-planned and thought-out property classifications—comprehensive zoning as defined in **Euclid** — with spot zoning. Such not only breeds lack of faith in the public in the integrity of such laws but may well result in constitutional infirmity of the whole zoning plan.

Where neighborhoods begin to change, it becomes the duty of the governing body to look at the picture as a whole and not the individual parts. The whole area should be considered for rezoning in a comprehensive manner.

It is a cardinal principle that the legislative power must be exercised in the public interest. When Justice Sutherland in **Euclid** used, what has now become the keystone of zoning law, the expression "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control," he was speaking of comprehensive zoning which finds its justifications in some aspect of the police power asserted for the public welfare. I am finding it more and more difficult to apply this principle to situations of the kind presented by this record.

For these, as well as the reasons pronounced in the decision of the District Court which we approve, I concur. CARLTON, ADKINS, and BOYD, JJ., concur